90-1549

CASE NO. _____

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

GORDON R. STAHN,
Petitioner,
v.
RAY HAECKEL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

HAVE LOWER COURTS DEPRIVED PETITIONER OF PROPERTY RIGHTS WITHOUT DUE PROCESS AND EQUAL PROTECTION OF 11 U.S.C. §1226 BY ORDERING PETITIONER TO MAKE CHAPTER 12 DEBTOR PLAN PAYMENTS TO TRUSTEE PRIOR TO CONFIRMATION OF PETITIONER'S TIMELY FILED FARM REORGANIZATION PLAN?

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REPORTED LOWER COURT OPINIONS

The Judgment and Opinion of the U.S. Circuit Court of Appeals (Appendix A) at bar is reported at 920 F.2d 555 (8th Cir. 1990).

JURISDICTION

The Opinion (Appendix A) herein sought by Petitioner to be reviewed by this Court was entered by the U.S. Court of Appeals for the Eighth Circuit on December 7, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The herein applicable Fifth and Fourteenth Amendments to the U.S. Constitution respectively in part provide:

> ". . . nor shall any person be . . . deprived of . . . property, without due process of law . . ."; and
>
> ". . . nor shall any State . . . deny to any person . . . equal protection of the laws."

11 U.S.C. § 105(a) provides:

"The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

11 U.S.C. § 1208(c) in part provides:

"On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including

. . .

(4) failure to commence making timely payments required by a confirmed plan . . .".

11 U.S.C. § 1226 provides:

"(a) Payments and funds received by the trustee shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor, after deducting—

(1) any unpaid claim allowed under section 503(b) of this title; and

(2) if a standing trustee is serving in the case, the percentage fee fixed for such standing trustee.

(b) Before or at the time of each payment to creditors under the plan, there shall be paid--

(1) any unpaid claim of the kind specified in section 507(a)(1) of this title; and

(2) if a standing trustee appointed under section 1202(d) of this title is serving in the case, the percentage fee fixed for such standing trustee under section 1202(e) of this title.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan."

11 U.S.C. § 1326 provides:

"(a)(1) Unless the court orders otherwise, the debtor shall commence making the payments proposed by a plan within 30 days after the plan is filed.

(2) A payment made under this subsection shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payment to the debtor, after deducting any unpaid claim allowed under section 503(b) of this title.

(b) Before or at the time of each payment to creditors under the plan, there shall be paid--

(1) any unpaid claim of the kind specified in section 507(a)(1) of this title; and

(2) if a standing trustee appointed under section 586(b) of title 28 is serving in the case, the percentage fee fixed for such standing trustee under section 586(e)(1)(b) of title 28.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan."

STATEMENT OF CASE

Pursuant to 11 U.S.C. § 1201, Petitioner filed (Case No. 88-49335-PKE) for chapter twelve bankruptcy on July 25, 1988 with the U.S. Bankruptcy Court for the Southern Division of South Dakota, hereinafter referred to as "Bankruptcy Court". Pursuant to 11 U.S.C. § 1221, Petitioner on October 25, 1988 timely filed his Plan for repayment of Respondent, among his other credi-

tors. At all material times herein, the Bankruptcy Court neither confirmed nor denied Petitioner's Plan at a hearing pursuant to 11 U.S.C. § 1225.

The Plan confirmation hearing was originally scheduled to be held on November 17, 1988, but because Petitioner had previously filed objections to creditor proofs of claim and the Bankruptcy Trustee therewith decided that it would be impossible to determine the feasibility of Petitioner's Plan until after these objections were adjudicated, the Plan confirmation hearing was continued to January 12, 1989. Prior to the hearing scheduled for December 21, 1988 to adjudicate Petitioner's objections to creditor proofs of claim, two creditors, Fairmont National Bank and Todd Boyd, motioned the Bankruptcy Court to abstain from hearing these objections. The Bankruptcy Court granted relief from stay to Todd Boyd and Fairmont National Bank to

proceed to judgment in state court. The Bankruptcy Court has subsequently approved a settlement between Petitioner and Todd Boyd. The case between Fairmont National Bank and Petitioner to determine if said bank is entitled to a deficiency judgment in the amount of its claim remains pending in the Minnesota state courts due to an excessively crowded docket and the unavailability of a judge to try this case. Fairmont National Bank sought this Minnesota forum rather than having this case decided in Bankruptcy Court, which transfer Petitioner resisted in Bankruptcy Court.

On motion by Fairmont National Bank to continue the January 12, 1989 hearing previously scheduled for confirmation of Petitioner's Plan so as to allow Fairmont National Bank to proceed to deficiency judgment in a Minnesota state court in advance of the Plan confirmation hearing to be held by the Bankruptcy Court; the Bank-

ruptcy Court continued the plan confirmation hearing to February 15, 1989. To further accomodate the Fairmont National Bank's continued effort to litigate for deficiency judgment against Petitioner in a Minnesota state court, the Bankruptcy Court granted Fairmont National Bank's renewed motion that the Petitioner's Plan confirmation hearing not be held on February 15, 1989 as previously scheduled, and the Bankruptcy Court rescheduled the plan confirmation hearing to be held on March 15, 1989.

At the plan confirmation hearing on March 15, 1989, counsel for Fairmont National Bank motioned the Bankruptcy Court to indefinitely continue the Petitioner's farm reorganization and creditor payment plan confirmation hearing until said Bank had an opportunity to exhaust its remedies in Minnesota state court in its filed and

pending action to take deficiency judgment against Petitioner. From the bench on March 15, 1989, the Bankruptcy Court granted this motion in favor of the Fairmont National Bank, and ordered that the plan confirmation hearing be continued indefinitely until the Fairmont Bank claim is adjudicated in the Minnesota District Court.

That there has been no confirmation hearing on Petitioner's farm reorganization and creditor payment plan solely attributes to the Bankruptcy Court's decision to allow the Fairmont National Bank to litigate its creditor claim against Petitioner in yet to be litigated proceedings in the Minnesota District Court; where this Bank claim could have otherwise been adjudicated by the Bankruptcy Court in a Petitioner-noticed hearing scheduled for that purpose on December 21,

1988. This December 21, 1988 hearing was not held as scheduled and noticed by Petitioner because the Bankruptcy Court by order of December 7, 1988, transferred, on motion by Fairmont National Bank, said Bank's creditor claim to the Minnesota District Court for adjudication.

The failure to date for the Bankruptcy Court to hold a hearing on Petitioner's timely filed farm reorganization and creditor payment plan attributes solely to the Fairmont National Bank's inability to have its claim against Petitioner brought on for trial in the Minnesota District Court in a timely manner, and has not been the fault of Petitioner as, however immaterial herein, has been hereinbefore erroneously but sucessfully alleged by Respondent to the District Court and Court of Appeals.

On July 26, 1989, Respondent filed a meritless, prima facie frivolous and

vexatious on the record herein, motion to dismiss Petitioner's Chapter 12 case on the misalleged 11 U.S.C. § 1208(c) grounds that:

> ". . . the court may dismiss a case under this chapter for cause including—
>
> (1) unreasonable delay, or gross mismanagement by the debtor that is prejudicial to creditors . . .
>
> . . .
>
> (3) failure to file a plan timely under section 1221 of this title . . .".

Pursuant to the September 6, 1989 hearing on the foregoing motion, the Bankruptcy Court on November 6, 1989 herein made and entered an order (Appendix E) that Petitioner "commence making payments" to Respondent notwithstanding the above detailed fact that the Court had yet to hold a confirmation hearing on Petitioner's creditor payment plan which had been timely filed by Petitioner on October 25, 1988.

On December 22, 1989 Petitioner appealed (Case CIV89-4158) the Bankruptcy Court's aforesaid November 6, 1989 order, to the Southern Division of the U.S. District Court of the District of South Dakota, hereinafter referred to as "District Court". At the March 12, 1990 hearing of this appeal before the District Court, the Court from the bench held:

> "It is the view of the Court that the Judgment and Decision of the Bankruptcy Court should be affirmed. It is the view of the Court that, notwithstanding the lack of an expressed provision in Chapter 12 authorizing pre-confirmation payment by the debtor, there is on the other hand no provision that prohibits it and it is the Court's view that under the general provisions of Chapter 12 the Court has the equitable power to do what it did and, therefore, the decision will be affirmed." (Appendix D - p.43)

Pursuant to the foregoing holding, the District Court on March 13, 1990 made and entered a Judgment (Appendix B) affirming the November 6, 1989 order directing payments by debtor and dismissing the appeal

thereof by Petitioner to the District Court.

On April 10, 1990, Petitioner appealed (Case No. 90-5195) the March 13, 1990 Judgment of the U.S. District Court to the United States Court of Appeals for the Eighth Circuit (hereinafter referred to as "Court of Appeals"); in which court jurisdiction to hear the case at bar is vested pursuant to 28 U.S.C. § 158(d).

On December 7, 1990, the Court of Appeals made and entered a decision (Appendix A) affirming the decision of the Bankruptcy Court and the District Court by finding and holding at pages 4-6 thereof as follows:

> "According to the debtor, he is contesting the bankruptcy court's creation, by its drafting of the order, of mandatory pre-confirmation plan payments. Joint App. at 24. The language of section 1226(a), although not requiring pre-confirmation payments, does not state that a bankruptcy court is powerless to order such payments. In light of the facts of this case, in that the parties wanted to pay the taxes and pre-confirmation plan payments were a

way to achieve that goal, the bankruptcy court had the power, pursuant to 11 U.S.C. § 105(a) (1989), to order pre-confirmation plan payments."[6]

"[6]Section 105(a) states that:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provisions of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

As Rule 10(c) justification for this Court's review of the above-quoted opinion of the Court of Appeals, the Court of Appeals has therewith "decided an important question of federal law which has not been, but should be, settled by this Court . . .".

This is a case of first impression.

ARGUMENT

BANKRUPTCY COURT ERRED IN ORDERING PETITIONER TO MAKE CHAPTER 12 PAYMENTS TO

TRUSTEE PRIOR TO CONFIRMATION OF PETITIONER'S TIMELY FILED FARM REORGANIZATION PLAN, AND THEREBY DEPRIVED PETITIONER OF PROPERTY RIGHTS WITHOUT DUE PROCESS AND EQUAL PROTECTION OF 11 U.S.C. § 1226.

H.R. Rep. No. 958, 99th Cong., 2nd Sess. 48 (1986), The Joint Exploratory Statement of the Committee of Conference for the 1986 U.S. Bankruptcy Act, in part provides:

> "OVERVIEW OF THE FAMILY FARM SUBTITLE OF THE CONFERENCE REPORT
>
> Under current law, family farmers in need of financial rehabilitation may proceed under either Chapter 11 or Chapter 13 of the Bankruptcy Code. Most family farmers have too much debt to qualify as debtors under Chapter 13 and are thus limited to relief under Chapter 11. Unfortunately, many family farmers have found Chapter 11 needlessly complicated, unduly time-consuming, inordinately expensive and, in too many cases, unworkable.
>
> Accordingly, this subtitle creates a new chapter of the Code—Chapter 12—to be used only by family farmers. It is designed to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land. It offers family

> farmers the important protection from creditors that bankruptcy provides while, at the same time, preventing abuse of the system and ensuring that farm lenders receive a fair repayment.
>
> This new chapter is closely modeled after existing Chapter 13. At the same time, however, the new chapter alters those provisions that are inappropriate for family farmers — the requirement that the plan be filed within 15 days of the petition; the requirement that plan payments start within 30 days of the plan confirmation; and the low debt limits found in Chapter 13.
>
> Under this new chapter, it will be easier for a family farmer to confirm a plan of reorganization." (Emphasis added.)

Pursuant to its above unequivocably stated intention in its enactment of 11 U.S.C. § 1226, where 11 U.S.C. § 1326(a)(1) provides:

> "[u]nless the court orders otherwise, the debtor shall commence making the payments proposed by a plan within 30 days after the plan is filed";

this provision was intentionally deleted from 11 U.S.C. § 1226 so as to avoid the result herein erroneously effected by the lower courts in ordering the Petitioner to

make farm reorganization plan payments to creditors in advance of confirmation or denial of Petitioner's plan which was timely filed by Petitioner on October 25, 1988.

In writing the Family Farmer Bankruptcy Act of 1986, Congress eliminated the requirement of § 1326(a) of the Bankruptcy Code which stated that the debtor shall make mandatory pre-confirmation plan payments within 30 days of the filing of the bankruptcy plan. Congress wanted Chapter 12 to become more in line with Chapter 11, where payments begin after confirmation, than with Chapter 13, where payments begin before confirmation.

The lower courts err in invoking 11 U.S.C. § 105(a), which in part provides that the Bankruptcy Court:

> ". . . may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title",

to circumvent the 11 U.S.C. § 1226 prohibition against pre-confirmation plan

payments in Chapter 12 cases.

Both the Eighth Circuit Court of Appeals and the United States Supreme Court have had occasion to pass on 11 U.S.C. § 105(a). This Court has stated "that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." Norwest Bank of Worthington v. Ahlers, 485 U.S. 197, 206 (1988). The Bankruptcy Court is attempting to use its equitable powers to order pre-confirmation plan payments when these provisions have been specifically eliminated by Congress, and therefore the Bankruptcy Court's November 6, 1989 Order Directing Payments by Debtor (Appendix E) is not constant with the Bankruptcy Code.

The Eighth Circuit has stated that the Bankruptcy Court's "equitable powers may only be exercised in a manner which is consistent with the provisions of the Code". Johnson v. First National Bank of Montevideo, 710 F.2d

270, 273 (8th Cir. 1983). The equitable powers necessary to carry out particular code provisions do not include the ability to award equitable relief pursuant to 11 U.S.C. § 105(a) where such relief is not available under any other section of the Bankruptcy Code. In re Ozark Restaurant Equipment Co., Inc., 816 F.2d 1222 (8th Cir. 1987). Similarly, 11 U.S.C. § 105(a) does not authorize the Court to create new substantive rights. In re NWFX, 846 F.2d 593, 595 (8th Cir. 1989).

The thrust of the Eighth Circuit's analysis is that the Bankruptcy Court cannot enter orders under 11 U.S.C. § 105(a) which are not consistent with or are not authorized by the Bankruptcy Code. In this case, the Bankruptcy Court has ordered pre-confirmation plan payments which are not authorized by the Bankruptcy Code. The Court has recreated a provision (11 U.S.C. § 1326) of the Bankruptcy Code which Congress

has specifically eliminated in 11 U.S.C. § 1226, with stated legislative intent to this end. A Minnesota Federal District Court has stated that 11 U.S.C. § 105(a) does not give Bankruptcy Court the authority to contravene specific provisions of the Bankruptcy Code. In re Pirsig Farms, Inc., 46 B.R. 237 (D. Minn. 1985). The Petitioner submits that by using 11 U.S.C. § 105(a) to reinsert required pre-confirmation plan payments, the Bankruptcy Court has contravened the specific elimination of this requirement by Congress in writing the Farmily Farmer Bankruptcy Act of 1986.

The District Court concluded:

> ". . . notwithstanding the lack of an expressed provision in Chapter 12 authorizing pre-confirmation payment by the debtor, there is on the other hand no provision that prohibits it . . ." (Appendix D, p. 43),

and that it was therefore in the Bankruptcy Court's equitable power to order such a payment. This holding is clearly erroneous.

The Bankruptcy Court's Order required payment of what amounts to plan payments. This Chapter 12 Order, in error, incorporates 11 U.S.C. § 1326(a)(1) procedure to require payments which are ordered pending confirmation of the plan unter Chapter 13. Congress specifically eliminated the requirement of pre-confirmation payments. The truncated portion of § 1226 merely repeats what § 1326 stated about what a trustee was to do with funds received pending confirmation of the plan. However, the requirement of pre-confirmation payment was eliminated in 11 U.S.C. § 1226. This Bankruptcy Court Order seeks to reimpose that provision which was specifically eliminated by Congress.

The United States Supreme Court has spoken out on this matter. It has stated that "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress

acts intentionally in the disparate inclusion or exclusion' ". Russello v. U.S., 464 U.S. 16, 23 (1983).

Congress eliminated the mandatory language of § 1326(a) when it enacted § 1226. It specifically mentioned the exclusion in the legislative history. The lower courts, however, would have us infer that since Congress has not prohibited pre-confirmation plan payments that they are permitted. This logic is contrary to the general rules of statutory construction.

The Court of Appeals has stated that "[g]enerally speaking, a legislative affirmative description implies denial of the non-described powers". U.S. Marshals Serv. v. Means, 741 F.2d 1053, 1056 (8th Cir. 1984). Congress acted affirmatively in eliminating mandatory pre-confirmation plan payments from Chapter 12. This elimination implies a denial of non-described power, i.e. the power of the Court to order pre-confirmation

plan payments.

Chapter 13 plan payments under 11 U.S.C. § 1326(a) start 30 days after the plan is filed. This provision was eliminated by Congress in creating Chapter 12. The obvious inference is that Congress intended to eliminate pre-confirmation plan payments. This interpretation is supported by a case from the Court of Appeals for the District of Columbia. That Court stated that when "words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning". Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444 (C.A. D.C. 1988).

Respondent and the lower courts have focused on the equitable authority of the Bankruptcy Court to enter the November 6, 1989 Order Directing Payments by Debtor (Appendix E), given the facts of this case. Even if the Petitioner conceded, which he

does not, that the facts of this case warranted such an Order, the Petitioner contends that the Bankruptcy Court had no authority to enter such an order. No statutory or case authority to enter such an order has been cited by the Respondent or by the lower courts. The lower courts relied on the absence of prohibition of such an order. This reliance is insufficient and clearly erroneous.

The rules of statutory construction as applied to § 1226 clearly state that in eliminating the mandatory pre-confirmation plan payments, Congress acted intentionally and purposefully to exclude these payments. This legislative action in eliminating mandatory pre-confirmation plan payments implies a denial of the power to impose mandatory pre-confirmation plan payments. The words of § 1226 differ from § 1326 on the same subject, i.e. payments to trustee, and Congress must have intended

that § 1226 mean something different from § 1326. A vital portion of § 1326 was eliminated. This was the requirement that the debtor make pre-confirmation plan payments. Congress specifically mentioned this elimination in its reports of the 1986 bill.

The Bankruptcy Court has attempted to revive this portion of § 1326 by requiring pre-confirmation plan payments by the Petitioner. This Order specifically violates the Congressional intent to eliminate pre-confirmation plan payments when it enacted § 1226 of the Bankruptcy Code.

Where subsection (4) of 11 U.S.C. § 1208 (c) expressly provides that:

> "Failure to commence making timely payments required by a confirmed plan",

is a ground for the Bankruptcy Court "to dismiss a case under this chapter for cause", there is no provision in 11 U.S.C. § 1208(c) that the failure of a Chapter

12 debtor to make payments in advance of confirmation of his plan constitutes a ground for dismissal of a Chapter 12 case. This lack of express provision that non-payment of a debt in advance of plan confirmation constitutes a ground for Chapter 12 case dismissal is, by conclusive implication, further evidence of legislative intent not to require Chapter 12 debtor payments to creditors in advance of plan confirmation.

CONCLUSION

The Bankruptcy Code contains no provisions allowing the Bankruptcy Court to require pre-confirmation plan payments to the Chapter 12 trustee by the Petitioner. The Bankruptcy Court erred in entering such an order. It had no authority to do so under § 1226(a) of the Bankruptcy Code. By ordering the payments pursuant to 11

U.S.C. § 105(a), it overstepped its equitable authority by creating new substantive rights not within the confines of the Bankruptcy Code and by acting in direct contravention of the above quoted, at page 15, intention by Congress that the Chapter 13 requirement of payments in advance of plan confirmation not be required of Chapter 12 debtors such as Petitioner.

The Bankruptcy Court's Order Directing Petitioner to make pre-confirmation plan payments to the Chapter 12 trustee is contrary to law and represents an abuse of discretion.

WHEREFORE, Petitioner prays that this Court grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted this 6th day of March, 1991.

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APPENDIXES

[APPENDIX A]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-5195

Gordon R. Stahn, Appellant, v. Ray Haeckel, Appellee.	* Appeal from the United States District * Court for the District of South Dakota.

Submitted: September 12, 1990
Filed: December 7, 1990

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge, and ARNOLD, ircuit Judge.

LAY, Chief Judge.

Gordon Stahn filed for chapter twelve bankruptcy in South Dakota on July 25, 1988.[1] Under 11 U.S.C. § 1224 (1989), a confirmation hearing on the plan must be held within forty-five days after the filing. There had been no confirmation

[1]In the preceding six years Stahn had filed for bankruptcy five times in different states, all of which were dismissed.

hearing in this bankruptcy proceeding because the bankruptcy court granted another creditor relief from the stay to allow the creditor to determine a deficiency action in a Minnesota district court. Ray Haeckel, a creditor, moved to dismiss the present proceeding on July 26, 1989, pursuant to 11 U.S.C. § 1208 (1989)[2]. After hearing on the motion, the bankruptcy judge ordered Stahn to make payments to the trustee until the case was confirmed or dismissed. Stahn appealed and the district court affirmed the order of the

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[2]Section 1208(c) provides that:

> On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including—
>
> > (1) unreasonable delay or gross mismanagement, by the debtor that is prejudicial to creditors;
> >
> > . . .
> >
> > (3) failure to file a plan timely under section 1221 of this title . . .

11 U.S.C. § 1208(c)(1), (3) (1989).

bankruptcy court.

Stahn now argues that the bankruptcy court erred in ordering him to make payments to the trustee prior to confirmation of the plan. See 11 U.S.C. § 1226(a) (1989). Stahn argues that there is no express provision authorizing the court to order payments prior to plan confirmation. He notes that under chapter thirteen it is expressly provided that "[u]nless the court orders otherwise, the debtor shall commence making the payments proposed by a plan withing 30 days after the plan is filed." 11 U.S.C. § 1326(a)(1) (1989). Stahn argues, however, that Congress chose to exclude the pre-confirmation payment requirement of section 1326(a)(1) in section 1226(a) and that requiring such payments has not been authorized by Congress. The trustee argues that section 1226(a) provides implied approval for such pay-

ments. Section 1226(a) states that:

> [p]ayments and funds received by the trustee shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor . . .

11 U.S.C. § 1226(a) (1989).

The Supreme Court has stated that when "'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).[3] We find

[3]The Court sets forth a principle of statutory construction to be that: "Language in one statute usually sheds little light upon the meaning of different language in another statute, even when the two are enacted at or about the same time." Russello, 464 U.S. at 25.

little legislative history on this section and no judicial precedent. Congress did state that chapter twelve was "designed to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land." 132 Cong. Rec. 28, 144 (1986) (overview of the family farm subtitle of the conference report). Congress also observed that chapter twelve was modeled after chapter thirteen. Id. However, Congress stated that "the new chapter [twelve] alters those provisions that are inappropriate for family farmers--the requirement that the plan be filed within 15 days of the petitions; the requirement that plan payments start within 30 days of the plan confirmation."[4] Id. Congress added subsection (a) to section

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[4]We believe that Congress intended to state that, under chapter 13, plan payments must start within 30 days of filing, rather than confirmation, because there is no requirement that plan payments start within 30 days of plan confirmation. See 11 U.S.C. § 1326(a)(1) (1989).

1326, requiring plan payments to begin within thirty days after the filing of the plan, because of the variation among the bankruptcy courts as to when payments were to begin, the long delay in distribution to creditors, and the better plan success rate when payments began promptly. 5 Collier on Bankruptcy ¶ 1326.01 (15th ed. 1990).

It is true Congress did not preclude a court from ordering pre-confirmation payments under the language of section 1226(a). In addition, as the trustee argues, the language implies that pre-confirmation payments may be received because the section prescribes what trustees are to do with any pre-confirmation payments they receive. In the event a plan is not confirmed the trustee is required to return any pre-confirmation payments to the debtor. 11 U.S.C. § 1226(a)(1), (2) (1989).

Stahn asserts that an added detriment to the court-ordered payment is that the trustee may deduct any unpaid administrative claim allowed under 11 U.S.C. § 503(b) (1989), and the percentage fee for a standing trustee. 11 U.S.C. § 1226(a)(1), (2) (1989). Chapter twelve is unique in that a standing trustee may deduct a fee. 5 Collier, supra ¶ 1226.01 at 1226-2 n.4. On the other hand, a chapter thirteen standing trustee may not deduct a percentage fee if a plan is not confirmed. Id. Thus, a debtor in a chapter twelve proceeding may be subjected to involuntarily paying trustee fees and a commission if a bankruptcy judge orders preconfirmation payments. See 5 Collier, supra, ¶ 1226.01, at 1226-2. A long delay in confirming the plan, such as in this case, could be punitive to the debtor.

The bankruptcy court's order directed

the trustee to use a portion of the funds to pay the accrued and accruing real property taxes. Joint App. at 11. The debtor did not contest that portion of the order in the district court. Apparently, it was the debtor's suggestion to pay the taxes.[5]

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[5]At the hearing before the district court, the court inquired whether payment of the property taxes was a disputed point in the case. The attorneys responded by stating that:

> MR. HAYES [creditor's attorney]: My recollection at the time of the hearing was the fact that the payment of the property taxes was agreed to at the request of the debtor. . . .[E]ssentially, the parties agreed that it was in the best interest of everyone that the property taxes be paid and, as I say, my recollection is . . . that the debtor's [sic] requested that be done.
>
> MR. SCHMIDT [debtor's attorney]: The problem that comes up in these cases is that, when you've got pre-confirmation or pre-petition taxes a lot of districts won't take them or they won't take post-petition taxes until you have paid the pre-petition taxes and so you have these huge amounts of taxes building up and the taxing authority's think-

According to the debtor, he is contesting the bankruptcy court's creation, by its drafting of the order, of mandatory pre-confirmation payments. Joint App. at 24. The language of section 1226(a), although not requiring pre-confirmation payments, does not state that a bankruptcy court is powerless to order such payments. In light of the facts of this cse, in that the parties wanted to pay the taxes and pre-confirmation plan payments were a way to achieve that goal, the bankruptcy court had the power, pursuant to 11 U.S.C. §

> ing they can go ahead and sell property, even though they can't. And I guess, that was at our request.
>
> THE COURT: So you aren't appealing that portion of the order requiring the payment of taxes?
>
> MR. SCHMIDT: No. No, we're not appealing that. We would like to pay the taxes.

Joint Appendix at 24-25.

105(a) (1989), to order pre-confirmation plan payments.[6]

Although there is no express provision authorizing pre-confirmation payments there is also no provision prohibiting them. Because the language of the statute also contains procedures to deal with any pre-confirmation payments made, we hold that the bankruptcy court may in its discretion require a debtor to make payments prior to plan confirmation. Therefore, we affirm. . . .

---

[6]Section 105(a) states that:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a) (1989).

[APPENDIX B]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* * * * * * * * * * *

In re: * CIV89-4158

GORDON R. STAHN, *

Debtor. *

* * * * * * * * * * *

GORDON R. STAHN, *

Appellant, *

-vs- * JUDGMENT

RAY HAECKEL, *

Appellee. *

* * * * * * * * * * *

The above-entitled matter having come on before the Court on briefs and oral arguments and the Court having entered its Order, it is hereby

ORDERED, ADJUDGED AND DECREED that the Judgment of the Bankruptcy Court herein, dated November 6, 1989, be and hereby is affirmed and that this appeal is hereby dismissed.

Dated this 13th day of March, 1990.

/s/ William F. Clayton
Clerk, U.S. District
Court

[APPENDIX C]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

In re: GORDON R. STAHN, Debtor.	CIV 89-4158
GORDON R. STAHN, Appellant, -vs- RAY HAECKEL, Appellee.	ORDER DISMISSING BANKRUPTCY APPEAL

Gordon R. Stahn, having appealed the Judgment of the Bankruptcy Court dated November 6, 1989, and

The parties having submitted briefs, and the matter having come on regularly for oral argument on March 12, 1990, with the appellant appearing by Wesley D. Schmidt, the appellee Ray Haeckel appearing by Robert E. Hayes, and

After oral argument and upon the record herein, the Court having determined that

the judgment of the Bankruptcy Court should be affirmed and the appeal should be dismissed.

Now, therefore,

IT IS ORDERED AND ADJUDGED:

(1) That the judgment of the Bankruptcy Court herein, dated November 6, 1989, be and hereby is affirmed.

(2) That this appeal is hereby dismissed.

Dated this 13th day of March, 1990.

BY THE COURT:

/s/ John B. Jones
United States District Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY: /s/ Jackie Meisenheimer
Deputy

(SEAL)

[APPENDIX D]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* * * * * * * * * * * * *

Gordon R. Stahn,

Appellant,

-vs-

Ray Haeckel,

Appellee.

Docket No. CIV89-4158

Sioux Falls, South Dakota

March 12, 1990

10:20 o'clock a.m.

* * * * * * * * * * * * *

[PARTIAL] TRANSCRIPT ON HEARING
ON MOTION BEFORE
THE HONORABLE JOHN B. JONES

* * * * * * * * * * * * *

. . . [page 9] . . .

THE COURT: . . . The issue then before the Court on this bankruptcy appeal is whether or not the Bankruptcy Court had the power to order that the debtor make payments to the Trustee to be held by the Trustee until confirmation or dismissal of the case and it is clear that the sections of Chapter 12 do not contain any provisions

for mandatory payments by the debtor prior to the confirmation of a Plan in Chapter 12, [page 10] unlike Chapter 13.

On the other hand, Section 1226 does make the provision for the Trustee receiving funds prior to the confirmation or denail of the Plan and the section provides, if the Plan is confirmed, the Trustee will distribute in accordance with the Plan and, if it is not confirmed, the Trustee will return the payments to the debtor.

The standard of review in this case as to legal issues is de novo and as to factual issues is clearly erroneous. In this case we have a debtor who has filed a number of bankruptcy petitions, all of which had been dismissed, except for this one and it appeared, therefore, that there was a pattern of delay by the debtor, rather than an effort to resolve the debtor's financial problems.

Under these factual circumstances and

under the factual circumstance that this bankruptcy had been filed in 1988, in the spring of '88 and that this hearing was held in July of '89, that there had been obviously, no particular diligence on the part of the debtor in submitting a Plan for confirmation.

It is the view of the Court that the Judgment and Decision of the Bankruptcy Court should be affirmed. It is the view of the Court that, notwithstanding the lack of an expressed provision in Chapter 12 [page 11] authorizing pre-confirmation payment by the debtor, there is on the other hand no provision that prohibits it and it is the Court's view that under the general provisions of Chapter 12 the Court has the equitable power to do what it did, and, therefore, the decision will be affirmed.

. . .

[APPENDIX E]

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

In re:	Case No. 88-49335-PKE
GORDON R. STAHN,	Chapter 12
Debtor.	ORDER DIRECTING PAYMENTS BY DEBTOR

In accordance with this Court's prior Order of September 14, 1989, and the Court having been advised by the representative of the Chapter 12 Trustee of the status of performance of that Order, and having heard the argument of the Debtor through his counsel, and the argument of counsel for Raymond Haeckel, and good cause thereby appearing,

IT IS HEREBY ORDERED that the Debtor shall forthwith commence making payments as outlined in correspondence of Wesley D. Schmidt directed to parties and creditors herein under date of October 6, 1989,

pending further proceedings in this case; and

IT IS FURTHER ORDERED that said funds shall be received by the Chapter 12 Trustee, placed by him at interest, and retained until confirmation or dismissal of this case; and

IT IS FURTHER ORDERED that from said funds, representing the net disposable income of the Debtor herein, the Chapter 12 Trustee shall make payment of accrued and accruing real property taxes at such time as he is able.

Dated November 06, 1989.

BY THE COURT:

/s/ Peder K. Ecker
Peder K. Ecker
Judge, U.S. Bankruptcy Court

ATTEST:

Patricia Merritt, Clerk

By /s/ Christine J. Jackson
Deputy Clerk

(SEAL)